

1
2
3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 AYDE AZUCCERA PEREZ GUTIERREZ,
8 et al.,
9
10 v.
11 MARISCOS EL PUERTO, INC., et al.,
12 Defendant(s).

Case No. 2:19-CV-1940 JCM (EJY)

TEMPORARY RESTRAINING ORDER

13
14 Presently before the court is plaintiffs Ayde Azuccera Perez Gutierrez, Brenda Karla
15 Gabrela Reyes Medrano, Adriana Torres, Erika Socorro Valle Peralta, Salvador Vladimir
16 Jimenez Flores, and Viridiana Ramirez Rodriguez’ (collectively “plaintiffs”) motion for
17 temporary restraining order. (ECF No. 4).

18 Also before the court is plaintiffs’ motion for preliminary injunction. (ECF No. 5).

19 **I. Background**

20 This action arises from defendants Mariscos El Puerto, Inc., La Catrina, LLC, La Catrina
21 Entertainment, LLC, Manuela Hernandez, Julian Hernandez, Hector Moreno, and Danny
22 Hernandez’ (collectively “defendants”) purported violations of Nevada labor law and various
23 sections of the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* (“FLSA”). (ECF No.
24 1).

25 Defendants are engaged in the operation of two restaurants—the “La Catrina Bar &
26 Grill” and “Mariscos El Puerto”—for which plaintiffs are all current or former employees. (ECF
27 No. 4). Plaintiffs allege that defendants failed to pay them minimum wage, withheld overtime
28 wages, and retaliated against them for filing the instant action. *Id.*

1 On November 5, 2019, plaintiffs filed a complaint alleging seven causes of action: (1)
2 violation of FLSA minimum wage and overtime provisions pursuant to 29 U.S.C. § 201 *et seq.*;
3 (2) retaliation in violation of 29 U.S.C. § 215; (3) failure to pay all wages due and owing upon
4 termination pursuant to NRS 608.020–608.050; (4) failure to pay minimum wages in violation of
5 Article 15, Section 16 of the Nevada Constitution; (5) failure to pay wages for all hours worked
6 in violation of NRS 608.140 and 608.016; (6) failure to pay overtime wages in violation of NRS
7 608.140 and 608.018; and (7) civil conspiracy. (ECF No. 1). Plaintiffs bring this suit pursuant
8 to 29 U.S.C. § 216(b), which provides in relevant part that “[a]n action to recover the liability
9 prescribed in [sections 206, 207, or 215(a)(3) of the FLSA] may be maintained against any
10 employer (including a public agency) in any Federal or State court of competent jurisdiction by
11 any one or more employees for and in behalf of himself or themselves and other employees
12 similarly situated.”

13 Now, plaintiffs request that the court issue a temporary restraining order enjoining
14 defendants from retaliating against plaintiffs and other similarly situated employees. (ECF No.
15 4). Plaintiffs request that the court either order defendants to read aloud, or order defendant to
16 permit a representative of plaintiffs to read aloud, a prepared statement to all employees
17 employed by defendants informing them of their rights under the FLSA. *Id.* In addition,
18 plaintiffs request that defendants be required to post a copy of the aforementioned statement at
19 each restaurant and provide a written copy of the statement to all employees with their next
20 paycheck. *Id.* Plaintiffs also request all costs and expenses incurred in maintaining this action.
21 *Id.*

22 **II. Legal Standard**

23 Under Federal Rule of Civil Procedure 65, a court may issue a temporary restraining
24 order when the moving party provides specific facts showing that immediate and irreparable
25 injury, loss, or damage will result before the adverse party's opposition to a motion for
26 preliminary injunction can be heard. Fed. R. Civ. P. 65. “Injunctive relief is an extraordinary
27 remedy and it will not be granted absent a showing of probable success on the merits and the
28

possibility of irreparable injury should it not be granted.” *Shelton v. Nat’l Collegiate Athletic Assoc.*, 539 F.2d 1197, 1199 (9th Cir. 1976).

“The purpose of a temporary restraining order is to preserve the status quo before a preliminary injunction hearing may be held; its provisional remedial nature is designed merely to prevent irreparable loss of rights prior to judgment.” *Estes v. Gaston*, No. 2:12-cv-1853-JCM-VCF, 2012 WL 5839490, at *2 (D. Nev. Nov. 16, 2012); *see also Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984).

This court must consider the following elements in determining whether to issue a temporary restraining order and preliminary injunction: (1) likelihood of success on the merits; (2) likelihood of irreparable injury if preliminary relief is not granted; (3) balance of hardships; and (4) advancement of the public interest. *Winter v. N.R.D.C.*, 555 U.S. 7, 20 (2008); *Stanley v. Univ. of S. California*, 13 F.3d 1313, 1319 (9th Cir. 1994); Fed. R. Civ. P. 65 (governing both temporary restraining orders and preliminary injunctions).

The party seeking the injunction must satisfy each element; however, “the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). “Serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” *Id.* at 1135 (internal quotations marks omitted).

Finally, to obtain injunctive relief, plaintiff must show it is “under threat of suffering ‘injury in fact’ that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.” *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 (9th Cir. 2011) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009)).

III. Discussion

a. Issuance of temporary restraining order

1 Plaintiffs have filed their motion for temporary restraining order *ex parte*. (See ECF No.
2 4). Under Rule 65(b), a court may issue an *ex parte* temporary restraining order if (1) “specific
3 facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury,
4 loss, or damage will result to the movant before the adverse party can be heard in opposition”;
5 and (2) “the movant’s attorney certifies in writing any efforts made to give notice and the reasons
6 why it should not be required.”¹ Fed. R. Civ. P. 65(b); *Reno Air Racing Ass’n v. McCord*, 452
7 F.3d 1126, 1130 (9th Cir. 2006).

8 The court, having considered the complaint, plaintiffs’ motion, supporting declarations,
9 and accompanying exhibits, finds that the issuance of a temporary restraining order is
10 appropriate for the following reasons:

11 *1. Likelihood of success on the merits*

12 First, plaintiffs are likely to succeed in showing that defendants failed to pay minimum
13 wage, wrongfully withheld overtime wages, and improperly retaliated against plaintiffs for filing
14 this action. The FLSA expressly prohibits: (1) failure to pay a minimum wage of \$7.25 per hour;
15 (2) failure to pay overtime wages; and (3) retaliation against any employee for filing an action
16 under the FLSA. 29 U.S.C §§ 206, 207, 215(a)(3). Injunctive relief for these violations is
17 authorized under 29 U.S.C § 217. Plaintiffs have presented evidence that defendants failed to
18 pay minimum and overtime wages. (Torres’ Decl. ¶ 3; Rodriguez’ Decl. ¶ 3). Plaintiffs have
19 also presented evidence that defendants retaliated against them by cutting their wages and hours
20 and by making physical and economic threats against them. (ECF No. 4, Ex. 1; Torres’ Decl. ¶¶
21 4–6, 11; Rodriguez’ Decl. ¶¶ 5–6, 9). Based on this evidence, the court finds that plaintiffs are
22 likely to succeed on the merits of their claims.

23 *2. Likelihood of irreparable injury*

24 Second, allowing defendants to continue to flout the requirements of the FLSA will likely
25 result in immediate and irreparable injury to plaintiffs, similarly situated employees, and the
26 public interest. Defendants’ threats appear to have chilled other employees from speaking to

27
28 ¹ Plaintiffs’ attorney Jakub Medrala has attached a declaration to the motion for
temporary restraining order sufficient to satisfy the certification requirement set forth in Federal
Rule of Civil Procedure 65(b)(1)(B). (See ECF No. 4).

1 plaintiffs. (Torres' Decl. ¶¶ 5, 10–11; Rodriguez' Decl. ¶¶ 8–11). Should defendants' threats
2 and intimidation tactics continue, plaintiffs will not be able to adequately investigate the alleged
3 misconduct and will likely suffer irreparable injury as a result.

4 Other similarly situated employees will likely be irreparably harmed by the chilling and
5 deterrent effect that results from retaliation against those employees who seek to enforce their
6 rights. *See Holt v. Continental Group, Inc.*, 708 F.2d 87, 91 (2d Cir. 1983) (noting that
7 retaliation may deter other employees from protecting their rights under the FLSA and that this
8 risk may constitute irreparable injury).

9 Further, there is a strong public interest in favor of enforcement of the FLSA, which
10 seeks to eliminate “labor conditions detrimental to the maintenance of the minimum standard of
11 living” of workers. 29 U.S.C. § 202(a). The court therefore finds that plaintiffs have satisfied
12 the irreparable harm requirement.

13 3. *Balance of hardships*

14 Third, the balance of hardships weighs in plaintiffs' favor. Without a temporary
15 restraining order, plaintiffs will likely suffer significant hardship due to the irreparable harm that
16 will likely result from defendants' continued violation of the FLSA. Further, defendants have no
17 legitimate interest in threatening, intimidating, or otherwise retaliating against plaintiffs in direct
18 contravention of their rights under the FLSA. The court finds that the balance of hardships
19 weighs in favor of issuing a temporary restraining order.

20 4. *Public policy*

21 Fourth, for the reasons discussed above, there is a strong public interest in favor of
22 enforcement of the FLSA. *See* 29 U.S.C. § 202(a). Accordingly, the court finds that this factor
23 weighs in favor of issuing a temporary restraining order.

24 b. *Plaintiffs' bond*

25 The issuance of a temporary restraining order is conditioned on the movant posting
26 security “in an amount that the court considers proper to pay the costs and damages sustained by
27 any party found to have been wrongfully enjoined or restrained.” Fed. R. Civ. P. 65(c). “The
28 district court is afforded wide discretion in setting the amount of the bond, and the bond amount

1 may be zero if there is no evidence the party will suffer damages from the injunction.” *Conn.*
2 *Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003). Further, a
3 strong likelihood of success on the merits may favor “a minimal bond or no bond at all.”
4 *California v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1326 (9th Cir. 1985).

5 Given the likelihood that plaintiffs will succeed on the merits and the lack of hardship
6 that a temporary restraining order will impose on defendants, there is a low probability that
7 defendants will suffer damages should it later be determined that the temporary restraining order
8 improperly issued. The court therefore declines to order a bond in this case.

9 *c. Requested relief*

10 Plaintiffs have proposed a number of conditions to include in the temporary restraining
11 order that they argue are necessary to prevent retaliation against them and protect their ability to
12 investigate defendants’ alleged misconduct. The court will adopt only those provisions that are
13 reasonably necessary to achieve these goals before the motion for preliminary injunction is heard
14 and decided.

15 Plaintiffs have requested an award of costs for maintaining this action. Plaintiffs have
16 cited no legal authority supporting their request for an award of costs related to this motion, so
17 the request is denied.

18 **IV. Conclusion**

19 Accordingly,

20 IT IS HEREBY ORDERED that plaintiffs’ motion for temporary restraining order (ECF
21 No. 4) be, and the same hereby is, GRANTED.

22 IT IS FURTHER ORDERED that defendants shall appear for a preliminary injunction
23 hearing on **November 22, 2019, at 10:00 a.m.** in courtroom 6A and SHOW CAUSE why a
24 preliminary injunction should not be granted that restrains and enjoins defendants from
25 retaliating against or terminating any plaintiff, or any other employee of defendants, and from
26 preventing plaintiffs, or any other employee of defendants, from participating in plaintiffs’
27 investigation or from exercising their rights under the FLSA.

1 IT IS FURTHER ORDERED that pending the preliminary injunction hearing, defendants
2 are temporarily restrained from terminating or threatening to terminate, cutting hours or wages,
3 reporting or threatening to report to immigration authorities, inflicting or threatening to inflict
4 bodily harm on, or retaliating or discriminating against their employees in any other way, based
5 on their belief that such employee participated, or intends to participate, in the present action,
6 whether as a witness or a plaintiff. Defendants are also temporarily restrained from instructing
7 any of their employees not to speak to representatives of the plaintiffs, otherwise coercing
8 employees to make false statements regarding the terms and conditions of their employment, and
9 from encouraging their employees or other parties to harass, threaten, or harm the plaintiffs or
10 any other persons participating in this lawsuit, whether as a witness or a party plaintiff.

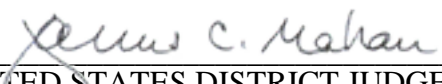
11 IT IS FURTHER ORDERED that defendants shall post at each worksite—"La Catrina
12 Bar & Grill" and "Mariscos El Puerto"— a statement, in both English and Spanish, and in an
13 open location easily visible to defendants' employees, that states:

14
15 You are protected by the Fair Labor Standards Act. Your employer is
16 prohibited from retaliating against you because of your participation in the
lawsuit against them, including any statements you may make as part of
the case.

17 The United States District Court for the District of Nevada has ordered
18 Defendants MARISCOS EL PUERTO, INC.; LA CATRINA, LLC; LA
19 CATRINA ENTERTAINMENT, LLC; MANUELA HERNANDEZ;
20 JULIAN HERNANDEZ; HECTOR MORENO; and DANNY
21 HERNANDEZ, and anyone acting on their behalf, not to coerce, retaliate
against, threaten to retaliate against, intimidate, or attempt to influence or
in any way threaten employees of La Catrina Bar & Grill and Mariscos El
Puerto for participating in this lawsuit.

22 IT IS FURTHER ORDERED that defendants shall file their response to plaintiffs'
23 motion for preliminary injunction (ECF No. 5) on or before November 18, 2019. Any reply shall
24 be filed on or before November 20, 2019.

25 DATED November 15, 2019, at 1:45 P.M.

26 
27 UNITED STATES DISTRICT JUDGE
28